

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1503

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
GLENN BANKS,
Defendant-Appellant.

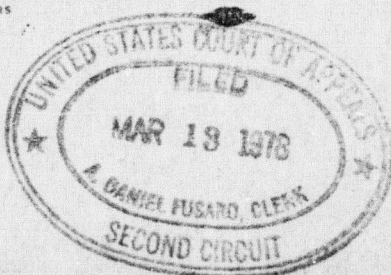
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLEE

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On Appeal From the United States District Court For
The Western District of New York

BRIEF FOR THE APPELLEE
Preliminary Statement

The government agrees with the preliminary statement in defendant's brief.

Statement of Facts

In February, 1977, following the unusually severe blizzard which struck the Buffalo area, a presidential declaration authorized a food stamp program designed to provide economic relief to the residents of Western New York. Because of this, approximately 25 million dollars worth of food stamps were distributed.

Not unexpectedly, there were reports of illegal dealings in food stamps, and the Department of Agriculture sent investigators into the area to work with local authorities, including the Erie County Sheriff's Department. The Department of Agriculture provided technical assistance, money, equipment, etc., and the Sheriff's Department proceeded to investigate leads of illegal food stamp transactions.

Utilizing an informant, Robert Gray, Sheriff's Detective Joseph Petronella, acting in an undercover capacity, approached the defendant's place of business, Harris Hardware. The informant, Gray, entered the store, and returned within a minute or so signalling Detective Petronella. Gray's role was merely to introduce the undercover agent to the defendant. Detective Petronella did enter the store and sold defendant \$1,000.00 worth of food stamps for \$300.00 in cash. The detective was wearing a body tape recorder which, according to him, recorded accurately the entire conversation he had with the defendant.

The first sale took place on February 25, 1977. At this time, Detective Petronella and the defendant made arrangements to meet on the following Monday to transact another sale.

Detective Petronella next contacted the defendant on the 26th of February. They negotiated a sale, but due to his involvement in other aspects of the food stamp investigation the sale was never consummated.

On Monday, February 28, 1977, Detective Petronella again met with the defendant. Defendant found it necessary to secure a large enough amount of money to purchase this consignment of food stamps. He cautioned Detective Petronella to not run out on him again. Detective Petronella left the store, returning some 30 minutes later. At that time defendant purchased \$3,000 worth of food stamps for \$900 in cash. This sale took place outside of the hardware store, at the trunk of Mr. Petronella's car.

On March 7, 1977 defendant and Detective Petronella conversed on the phone. Defendant offered merchandise as payment for more food stamps. Thereafter, the two met and defendant gave four TV sets as value for \$1,040 worth of food stamps.

On February 9, 1977 another phone call was placed by Detective Petronella to the defendant. At this time they arranged for a final sale, the finality being premised on Detective Petronella's story that he was leaving town. On March 11 that sale took place. This sale involved the exchange of \$9,000 in currency for \$30,000 worth of food stamps. At this point the defendant was arrested.

Defendant was charged with four counts involving each separate sale. He was acquitted on the first count and found guilty on the remaining three.

ARGUMENT

POINT I: The district court's failure to grant an evidentiary hearing on defendant's suppression motion does not require a remand for such hearing. The facts of this case do not show a requirement for either a search warrant or probable cause to support the government's activities.

POINT II: The government's involvement in this case is not so substantial as to be violative of Fifth Amendment Due Process principles. That defendant was predisposed to commit the crimes was proven beyond a reasonable doubt.

POINT III: A finding of entrapment as to the first count does not automatically result in a finding of entrapment in the remaining three counts.

POINT I

The district court's failure to grant an evidentiary hearing on defendant's suppression motion does not require a remand for such hearing. The facts of the case do not show a requirement for either a search warrant or probable cause to support the government's activities.

Defendant request the suppression of the money paid to the undercover agent in the illegal transactions of the sale of food stamps, as well as the tape recordings of those transactions. Defendant contends that the government activity in this instance was an intrusion into his privacy. By citing cases discussing privacy as under the protection of the Fourth Amendment the conclusion is drawn that the governmental activity necessitated the securing of a search warrant to invade such privacy. In the event that there is some constitutional basis for dispensing with a warrant, then it is argued that there must be at least a showing of probable cause.

There was no illegal search and seizure of the materials sought to be suppressed. The money was paid out by the defendant to the agent. There was no seizure by the agent; his acquisition came about through the consummation of business deals with the defendant. Neither were the conversations between the parties seized. Any person takes the chance that those with whom he is speaking are agents and may be recording his conversations. *Hoffa v. United States*, 385 U.S. 393.

For defendant to assert that the government must secure a search warrant or have probable cause for an investigation is patently absurd. This would overextend the notion of privacy to the point where it would unrealistically hamper police activities. Police necessarily act on less than probable cause when conducting preliminary investigations. It is the investigation itself which leads to the accumulation of evidence sufficient for a showing of probable cause.

The government became aware, through newspaper articles and other sources, that there were illegal food stamp dealings. To establish probable cause it had to first conduct an investigation. It was the investigation which gave rise to the probable cause secured to arrest the defendant.

Moreover, there was no invasion of defendant's privacy. Admittedly, the government made first contact with him. However, the overtures of the agent were never oppressive or overbearing. They never contravened established constitutional safeguards. The agent may have solicited the commission of the crimes, but he in no way invaded any property or other privacy rights of the defendant. Engaging Banks in business dealings (albeit illegal dealings) does not constitute an invasion of any judicially recognized right to privacy.

Defendant's reliance on *Lewis v. United States*, 385 U.S. 206 (1966) is misplaced. On the contrary, *Lewis* recognizes the need for undercover police work and the legitimate value in an agent's use of deceptive tactics, especially in this kind of case. Additionally, *Lewis* makes clear two issues material to the present facts: (1) receiving money from the defendant in exchange for food stamps and gathering statements from the defendant about the dealings are not really "searches and seizures" in a constitutional sense; and (2) defendant's hardware store (open to the public) and the street in front of it, where these transactions were conducted, is not the kind of protected area which is contemplated by the Fourth Amendment.

POINT II

The government involvement in this case, not so substantial as to be violative of Fifth Amendment Due Process principles. That defendant was predisposed to commit the crimes was proven beyond a reasonable doubt.

The conduct of the government is not at issue here, nor was it at issue at trial. The government has always maintained that its conduct involved some inducement, but inducement is in no way to be equated with a violation of Due Process. In this instance there was not an intolerable degree of governmental participation. The government activity was not "shocking to the conscience." Rather, the government became aware of a black market in food stamps immediately following the devastating blizzard which occurred in January of 1977, and the only practicable means of detection of this type of illicit operation was infiltration. To this end investigators and undercover agents were employed. Infiltration and deceit of this nature has been judicially sanctioned. *United States v. Russell*, 411 U.S. 423 (1973). *Lewis v. United States*, *supra*.

That this infiltration and deceit may have bordered on inducement because the government initiated the relationship certainly does not constitute entrapment as a matter of law, as defendant urges. "The fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution." *Sorrells v. United States*, 287 U.S. 435, 441 (1932); *Sherman v. United States*, 356 U.S. 369, 372 (1958); *United States v. Russell*, 411 U.S. 423, 435 (1973). The government presented proof beyond a reasonable doubt that defendant was predisposed to commit the crimes for which he was convicted. Once predisposition is proven the conviction will stand. *Russell*, *supra*; *United States v. Ambrose*, 483 F.2d 742 (6th Cir. 1973).

The most obvious element of the predisposition of the appellant is the fact that he consummated four deals with the undercover agent. Banks made a sale on his very first meeting with the agent. This is not the action of an "unwary innocent". He not only engaged in the transaction on February 25, but was ready and willing to participate in three subsequent deals. Further, Banks named dates and times of return for the agent and requested specific amounts of stamps. When he did not have enough cash on hand, he either left to secure more or gave goods as value.

Tape I

Feb. 25, 1977

Joseph Petronella: I'm in front of Harris's Hardware H-A-R-R-I-S, license plate number of his truck is 3126 G like in George, U like in Union. The other plate number of the truck is 8661 G.T. Spelling of the name is H-A-R-R-I-S.

Glenn Banks: You know man, well I talk but I talk to my man, ya see.

Banks: (Unintelligible) You know if you want to do it like this.

Voice: No no man, you ain't got to (unintelligible) on me.

Petronella: Yea, well (unintelligible) don't dig.

Voice: It's alright. You can come over this way. Man you can go up there and talk to him.

Petronella: Who?

Robert Gray: (Unintelligible), he wanted, he wanted the whole three, the grand for three hundred.

Petronella: Yea.

Gray: Yea.

Petronella: Hay, I don't dig doin it in here.

Banks: Why, ain't nobody in here.

Petronella: I don't want to bring em all in like that.

Voice: (Unintelligible).

Banks: Ain't nobody gonna take nothin' from ya.

Petronella: You sure?

Voice: Oh yea (unintelligible) gonna take nothin' from him, ain't nobody gonna take.

Petronella: Huh?

Voice: Ain't nobody gonna take nothin' from you.

Petronella: Where's the bread?

Gray: Ain't gotta worry bout it Joe. What's wrong with you.

Banks: There's the money right there.

Petronella: Alright.

Banks: Be cool.

Petronella: I mean there's people just wanna get jam-med.

Banks: Yea, come (unintelligible).

Petronella: No no no no no no no no no.

Banks: Look.

Petronella: Ha.

Banks: Ain't nobody back here.

Voice: Ain't nobody gonna do nothin' to ya man.

Voice: Seen somebody come in.

Petronella: Wow, you know.

Banks: Fact, they can, you can stay out there if they want to.

Petronella: Alright.

Banks: Ok. That's what he told me a thousand, right?

Petronella: There's a here's a thousand dollars. Check'em if you want.

Banks: "Booket" get, get back over there.

Petronella: Here, want'ta check some? One, two, three, four, five, six, seven, eight, nine, ten. That's four hundred, right? Those are seven's and deuces, ok? One, two, three, four, five, six, seven, eight, nine, ten. That's four hundred and there's sevens and deuces, there's a thousand. That's a pretty ring, where'd you get that?

Miles: Come in here Glenn.

Banks: It, well, wait a minute.

Petronella: That's a pretty ring.

Banks: Oh ah these this ring? Oh yea this travelin' ring. Ah . . .

Petronella: Eighty, that's a hundred. Eighty, ninety, two hundred.

Voice: (Unintelligible).

Banks: Miles.

Miles: Yea.

Banks: Look in my thing and bring me ah . . .

Banks: Here (unintelligible) hold that man, I'll be right back.

Petronella: Your ain't puttin' me through changes?

Banks: Oh, no I'm I'm I'm going into the . . .

Miles: How much these books (unintelligible).

Petronella: There's a thousand dollars there. Is he gonna be able to get rid of 'em all?

Miles: Huh?

Petronella: It's a thousand. Those are forty dollar books.

Voice: (Unintelligible).

Banks: Hay'um.

Petronella: Huh?

Banks: (Unintelligible). These books ain't got nothin in'em.

Petronella: Oh yea. That's

Banks: (Unintelligible).

Petronella: That's all, that's all that is is two dollars. Count'em up, count'em up. Man, you make me nervous, all these changes I get nervous.

Banks: Ha ha. You can't even . . .

Petronella: Huh?

Miles: (Unintelligible) some are seven dollars, some are two dollars.

Petronella: Yea, yea that's right.

Banks: I know but'a, but the forties there.

Petronella: The forties are there.

Banks: That's fifty.

Petronella: There's fifty.

Voice: (Unintelligible).

Banks: All you have ta do ta hold'em in your hand (unintelligible) put'em in your pocket. For what do ya have to . . .

Petronella: Well I wanted to make sure everything was straight.

Banks: No, I was talkin' about . . .

Petronella: Oh.

Banks: Ah, Miles that's it right.

Petronella: When do'ya want me?
 Banks: Huh?
 Petronella: When do'ya want'ta see me?
 Banks: For more?
 Petronella: Well I don't know, when when will you sell these? When do you want'em.
 Banks: Ah, let me, let me see what happen first, um . . .
 Petronella: Tomorrow?
 Banks: No, tomorrow . . .
 Petronella: Monday, Monday that's it for me.
 Banks: Monday? Alright. Check with me Monday then.
 Petronella: What time?
 Banks: 'Bout the same time.
 Petronella: Alright, who do I ask for or just ah . . .
 Banks: Well, you'll just see me here.
 Petronella: Ok, what time?
 Banks: I'll be here. Any, anytime in the evening time.
 What, what time is it now?
 Voice: Six, six o'clock.
 Petronella: I wish I had your diamond ring. Why can't we do somethin' for that?
 Banks: No . . .
 Petronella: Ah, your diamond pinky.
 Banks: This is, this is special ring.
 Petronella: Is it?
 Banks: Yea. That ring means somethin'.
 Petronella: Oh oh oh . . .
 Banks: That's special.
 Petronella: Oh, ha, ha, ha, ha, ha, alright, that means somethin'.
 Banks: Yea I know.
 Petronella: Oh alright, ok then.
 Banks: Ok.
 Petronella: Take care.
 Banks: (Unintelligible).
 Petronella: Ha, ha.
 Petronella: Has upper front teeth missing on the side of his mouth. The time is 6:30 P.M. The deal is completed and the other individual that was in the room is an

elderly individual, approximately in his 50's by the name of Miles. The person I just did business with was the owner of the establishment, approximately 35, 40 years old. Could be, correct that, approximately 50 years old. The place was on the corner of East Ferry and Waverly Street in the City of Buffalo.

Gov't. Exh. No. 55

Banks not only engaged in the transactions on February 25, but was ready and willing to participate in three subsequent deals. In the second transaction, he did not have sufficient cash on hand, and requested the agent to return in a short time, when he would have enough money to complete the sale.

Tape II

Feb. 28, 1977

Joseph Petronella: I'm in front of Harris's Hardware. Plate number of one truck is 3126 . . . U.

Petronella: How'ya doin'. The boss in?

Voice: Yea he inside.

Petronella: How'ya doin'?

Glenn Banks: Alright.

Petronella: What's happenin'?

Banks: Oh, what happen man, hay what happen, I been waitin'.

Petronella: I know but I got, ah, too many changes. I got'em in the trunk if you want'em.

Banks: Wha wha you what you got now? Does you got the . . .

Petronella: Do you want'ta . . .

Banks: . . . Three thousand or what.

Petronella: Yea. Why you wanted more . . . or less? I got three in the trunk.

Banks: Ok. You, ah nine hundred for the three thousand, right.

Petronella: Uh huh.

Banks: Ok.

Voice: I be lookin forward to see'in ya.

Banks: O—ok.

Voice: And thank you very much.

Banks: Hay, if I said come back in . . . in ah 30 minutes can you come back in 30 minutes and not screw me up like you did the last time. 'Cause see I had to go out and get the money, see I don't keep that kind of money here.

Petronella: Alright.

Banks: See yesterday I had ta'go to the warehouse and I spent 13 hundred dollars in cash.

Petronella: Alright.

Banks: Cause they had a sale on. If you, can you come back in 30 minutes? You gonna let me down like you did the last time?

Petronella: I'll be here in 30 minutes.

Banks: Ok.

Petronella: Promise it.

Banks: Well I get, I-I-I-I'll I'm a get the money together right here.

Petronella: I'm just gonna pull up in front, I got'em in the trunk, ok?

Banks: Ok.

Petronella: Alright.

Banks: Ok.

Petronella: Alrighty.

The agent left, returned and the sale was completed. At this time arrangements for another deal were again made.

Petronella: The individual I speak to is known to me as the owner of the hardware store . . . whose name is Glenn, G-L-E-N-N. Shut the machine off.

Radio: (Unintelligible).

Petronella: Ok. Come on Jimmy, pull up.

James Riley: Joe, (unintelligible).

Petronella: I'm in front of Harris's Hardware. This date February 28 for transaction number two. The defendant known to me as Glenn told me to come back within a half hour. The other license number of the truck is 8661 G.T.

Banks: Come on I'm ready.

Petronella: Yea, I don't want'ta bring'em in I got'em in the trunk. I get scared in there man.

Banks: Huh?

Petronella: I get scared.

Banks: If you don't want'ta go in there we can go over ah, to the furniture store. I don't want the people to be driven' up and down the car lookin'.

Petronella: Well I know it. Just let me open the trunk and show'em to ya so you know. Who's gonna see? I got'em in a bag. I got'em in a bag I'll show ya. I got'em in a bag.

Banks: Well look, you can, you can just walk on to the furniture store with'em.

Petronella: Alright, well let me just show'ya quick?

Banks: This, hay just come on over to the furniture store, see right there.

Petronella: Alright, just look one minute. Jus'lemme show'ya how I got'em.

Banks: Yea. Ok.

Petronella: I just don't want'ta go in.

Banks: Alright, bring'em under your coat, I got the money.

Petronella: I don't want'ta go inside I'm tell'in ya. Just put'em right here, I ain't go'in in no wheres. I ain't gettin' ripped off, you want'ta check'em, you check here. I ain't go'in inside no building.

Banks: What you got there?

Petronella: Three thousand dollars. Just open up every envelope, there's five hundred dollars. You got one, two, look one, two, three, four, five, six, seven, eight, nine, ten, right?

Banks: You go ahead and you count'em all. I'll just get your money ready. (Unintelligible).

Petronella: One, two, three, four, five, six, seven, eight, nine, ten, that's twenty, right, that's a that's a thousand right?

Banks: Right.

Petronella: One, two, three, four, five, six, seven, eight, nine, ten, there's fifteen hundred, right?

Banks: Right.

Petronella: One, two, three, four, five, six, seven, eight, nine, ten, that's two thousand.

Voice: (Unintelligible).

Petronella: (Unintelligible). One, two, three, four, five, six, seven, eight.

Banks: I don't want no, look I don't want no police or nothin' to drive up (unintelligible).

Petronella: I know, ten, alright (unintelligible) count the money out. One hundred, two hundred, three hundred, four hundred, five hundred, six hundred, seven hundred, eight hundred.

Banks: That's it right?

Petronella: Nine hundred.

Banks: Ok. You got any more?

Petronella: Yea, when do'ya want'em?

Banks: Bout an hour from now.

Petronella: Oh, ha, ha, ha. I'll see ah . . . I just promised some other people, I just don't want'ta . . . What'd you want, how many?

Banks: Look, you can deal right with me.

Petronella: (Unintelligible). Ha ha ha.

Banks: That way you ain't got no problems.

Petronella: What are'ya talkin'?

Banks: What ah, what you want'ta bring.

Petronella: (Unintelligible).

Banks: (Unintelligible) of it.

Petronella: Alright, let me do this. Let me do this. Let me talk to my guy, let me see what my guy's got right and . . .

Banks: Ok.

Petronella: Then I'll try ta do one thing with ya and end it, even if I do it at the end of the week or the beginning of the week. What could'ya handle?

Banks: Hay (unintelligible) I know the guys.

Petronella: Yea.

Banks: You know.

Petronella: Alright.

Banks: I know all the business guys.

Petronella: Ok.

Banks: And that way you don't go no farther.

Petronella: Ok.

Banks: It's just you and me.

Petronella: Yo, you tell me, what I'll do is this.

Banks: (Unintelligible).

Petronella: Why don't you write down a number where I could call you.

Banks: You got my, you got my phone number right (unintelligible). If you got a minute I'll give you my other phone number.

Petronella: Here write it.

Banks: I—I don't know it by heart, it's 884-4868. But you got my regular number though.

Petronella: Oh, the number from the store?

Banks: Yea.

Petronella: Alright, let me call'ya and tell'ya

Banks: (Unintelligible).

Petronella: What I got.

Banks: Call me call me in bout 30 minutes.

Petronella: What do I ask for, Glenn?

Banks: Yea.

Petronella: Ok.

Banks: Ok. I'll see'ya.

Petronella: What are'ya talkin' about anyways? What?

Banks: We talkin' bout, maybe, ah, fifteen, twenty thirty thousand dollars worth.

Petronella: Alright.

Banks: Ok.

Petronella: Yea, thirty thou?

Banks: Yea.

Petronella: Ok.

Petronella: Just completed the (unintelligible). Subject is a black male. Had a blue jacket on, blue ski cap, blue pants and boots. The time is twenty minutes of four. Shut off the tape.

Gov't. Exh. No. 56

During the third transaction, the defendant and undercover agent dickered over the terms of the sale. In exchange for merchandise given to him by Banks, the agent gave up \$1,040 worth of food stamps. This was less than what Banks stated he wanted, but the transaction was completed nevertheless.

Tape III
March 7, 1977

Joseph Petronella: 1977. I'm in front of Harris's Hardware.

Petronella: I'll be out here.

Glenn Banks: Ok.

Petronella: (Whistling) I just don't want'ta go in. I don't dig goin in, alright.

Banks: (Unintelligible) what I got you four.

Petronella: Ok.

Banks: (Unintelligible). There's two nineteen's and two twenty's.

Petronella: Alright.

Banks: Ok.

Petronella: What do'ya want for the four?

Banks: Well, (unintelligible). Do you know what you gave me last time?

Petronella: I'll give you, ah . . . 650? Stamps?

Banks: What I got, what I got in mind

Petronella: Six? What.

Banks: I got a (unintelligible) bout five, bout five hundred dollars there. (Unintelligible).

Petronella: In ah . . . real merchandise ya mean?

Banks: Yea.

Petronella: I'll give you ah . . .

Banks: Ok, give me two thousand of'em.

Petronella: Ah No . . .

Banks: (Unintelligible). What you (unintelligible) can give me?

Petronella: The most I'm gonna give you is ah . . . ten books of six, six-fifty, right. I'll give ya se—I'll give ya a thousand, thousand forty.

Banks: Thousand 40.

Petronella: That'll be, ah, sixteen books. Right?

Banks: Yea. Damn, you cuttin' it close.

Petronella: Thousand forty?

Banks: Yea, yea, ok, ok, alright (unintelligible) where you want'em at?

Petronella: In the car.

Banks: Ok. Yea get those, get these t.v.'s out here (unintelligible) stand, stand in the doorway.

Petronella: Yea. There's sixteen books, you check'em I trust'ya. Lemme open the car. Well we could put a couple in the trunk, huh? You could put'em all in here, can't ya?

Voice: Yea.

Petronella: I think you could. They'll all fit in there won't they?

Voice: Oh yea. (Unintelligible).

Petronella: Pretty good. Are they nice?

Voice: Oh yea.

Petronella: Yea.

Voice: Like new.

Petronella: Nice pieces?

Banks: Guaranteed.

Petronella: Guaranteed.

Voice: (Unintelligible).

Petronella: Alright, shut.

Banks: Yea.

Petronella: Ok. I'll call'ya tomorrow?

Banks: Yea, hay yea (unintelligible) what do, well what do, hay.

Petronella: Well.

Banks: Hay.

Petronella: Friday you said you want that thing.

Banks: Yea, well.

Petronella: Your talkin'.

Banks: Yea well, you know what.

Petronella: What are you talkin' Friday, what.

Banks: But this deal here, what you gonna let me have ah ah another thousand for in money 'cause see I got, I got this (unintelligible) . . .

Petronella: Ah, ha ha. The next one, let me see if they're happy with this I'll do it again.

Banks: Alright.

Petronella: You got more?

Banks: Yea, yes if you got a thousand now I give you three hundred.

Petronella: Oh, this is what I'll do. You (unintelligible) here.

Voices: (Unintelligible).

Petronella: Here.

Voices: (Unintelligible).

Petronella: Right here.

Voices: (Unintelligible).

Petronella: No problem, right here, here ya go this side.

Voice: I got the papers on you. Ain't no, ain't nothin' wrong about them at all. You ain't got to worry about nothin' (unintelligible).

Petronella: Why don't I call'ya tomorrow? What time will I catch'ya here?

Banks: Well, I'll, I'll be in and out but you can catch me, when (unintelligible) you want'ta call I could be here, (unintelligible).

Petronella: I'll call'ya like, ah, 10 o'clock.

Banks: Yea.

Petronella: Alright ah . . .

Banks: Call bout 10 or 10 yea 10. I'll be

Petronella: I'll call you at 10 sharp.

Banks: In the mornin'. Right.

Petronella: Any stuff at all you can get. That's what they want, stuff.

Banks: Well, ah (unintelligible).

Petronella: Anything, long as it's new. Long's they can sell it. Whatever you got:

Banks: (Unintelligible).

Petronella: I'll call you at 10 o'clock, you still want, you want what Friday? You said you wanted a lot Friday?

Banks: Yea, but, if I know what you, what you gonna bring Friday.

Petronella: You tell me, I got a case.

Banks: Uh huh.

Petronella: I got a case comin' in Thursday. They ain't gonna fit that way are they? Is it gonna fit?

Voice: Set, set that one up.

Voices: (Unintelligible).

Petronella: What are you talkin, ah, Friday? Just stand it up. Thank you.

Banks: (Unintelligible) When you give me I'll tell you what when you give me the call in the morning I'll let you know.

Petronella: Tomorrow, alright.

Banks: Yea, right.

Petronella: Ok.

Banks: Ok.

Petronella: I'll talk to'ya 10 o'clock at this number.

Banks: Right.

Petronella: Ok, alright Glenn.

Petronella: Completion of deal. Time 6 p.m. Four Panasonic televisions, all intact. Drivin' back down Ferry, just passed Chester. I'm at Ferry and Maston.

Gov't. Exh. No. 57

A fourth and final sale took place on March 11, 1977. Upon completion of this sale Banks was arrested. This sale, as all the others, was quickly completed. Neither here, nor in any of the sales, is there undue pressure on the part of the agent. Defendant was ready and willing here, as in each sale.

Tape IV

March 11, 1977

Joseph Petronella: What's it look like?

Voice: Hm?

Petronella: What's it look like?

Voice: (Unintelligible).

Petronella: I don't want to hang around here too long. I got'em in the trunk.

Glenn Banks: Yea, ok. Ah . . . hay, what I'm gonna do, I'm bringing my sack down. I'm putting them in there and I'm bring my money to 'ya.

Petronella: Bring what out?

Banks: My, you know, somethin' to put'em in.

Petronella: They're in bags. I'll show you.

Banks: Oh, d'ya? Ok.

Petronella: (Unintelligible) let's take a look at them.

Banks: (Unintelligible).

Petronella: Ten thousand in a bag.

Banks: Ten thousand straight.

Petronella: Yea.

Banks: Alright.

Petronella: (Unintelligible).

Banks: Ok.

Petronella: All right. No hanky panky. I trust'ya.

Banks: Ok.

Radio: Alpha 05 we're made up here. (Unintelligible). . . . there are people all over, but that's not going to bother anything.

Petronella: Alright, do you read the bug, one.

Radio: Yea Joe.

Petronella: Ok.

Radio: Ok. He's going in to get the bread?

Petronella: Yea, yea the bread or a gun.

Radio: Well, we're close.

Petronella: Today is March 11, 1977. Time approximately 4:10 p.m. this date. I'm in front of Harris Hardware on East Favor . . . East Ferry and Waverly Street. Got it? (Unintelligible).

Banks: (Unintelligible) I trust you, I trust you, I trust you. (Unintelligible) give me two hundred more. I gotta get paid. You got the money. (Unintelligible).

Petronella: That's it for me. I'm, I've had it. You, you got me dry. Oh, take care.

Banks: Alright.

Govt. Exh. No. 58

It is submitted that the government has met its burden of proving defendant's predisposition by demonstrating his "ready and willing" participation in the illegal conduct. *United States v. Rosner*, 485 F.2d 295 (2nd Cir. 1971), *cert. denied*, 94 S.Ct. 3080; *United States v. Bishop*, 367 F.2d 806 (2nd Cir. 1966); *United States v. Weiser*, 428 F.2d 932 (2nd Cir. 1969), *cert. denied*, 91 S. Ct. 1606; *United States v. Smalls*, 363 F.2d 417 (2nd Cir. 1966), *cert. denied*, 87 S.Ct. 755.

Defendant's argument that the government's investigation "created crime" and that it represented an intolerable violation of defendant's rights to Due Process is simply without merit and should be rejected.

POINT III

A finding of entrapment as to the first count does not automatically result in a finding of entrapment in the remaining three counts.

The issue of entrapment is a jury question. The jury in this case was carefully instructed as to the issues of the case and the defense of entrapment. The instructions were thorough and accurate. That they were carefully considered by the jurors is evidenced by the fact that during deliberation they requested clarification (Gov. App. 46-52). It is not at all inconsistent, therefore, for the jurors to decide that there was some reasonable doubt as to the circumstances of the first sale. However, when defendant readily engaged in three subsequent transactions the issue of predisposition was put to rest. There is no rule which requires consistency in the thought process of the jury so long as their verdict is consistent with the evidence presented. "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government to support it." *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Tucker*, 526 F.2d 279 (1976).

There was no continuous course of conduct on the part of the government which would mandate a finding of predisposition in all four counts. While each transaction followed the other, they were not irretrievably intertwined. Each sale was separate and involved different amounts of stamps and money. No one sale depended on others for consummation. As has already been stated, appellant proved his predisposition to commit the crimes involved by his participation in four distinct sales. If the jury chose to give him the benefit of the doubt in the first count as to predisposition, they were free to do so. It could have been rationally concluded that there was some reasonable doubt as to Count One, but no

subt as to the remaining three. This conclusion is logical and supported by the evidence.

Thus, Judge Elfvin's instructions to the jury properly set forth the jury's obligation to consider each count separately (Gov. App. 3, 5, 31, 32, 34, 39 to 41, 46 to 52). If anything, the tenor of the court's remarks suggested a possibility that the jury's decision as to the first transaction should somehow be a stronger factor in later counts (See Gov. App. 31-32, 46 to 52), an implication favoring the defendant. In the court's order of October 25, 1977, denying defendant's post-verdict motion against the conviction, it was again properly recognized that the jury's verdict was supported by the evidence and was consistent with their right—indeed duty—to consider each count separately (Def. App. 201). The defendant's claim that these instructions and the court's ruling were erroneous is without foundation.

Conclusion

For the foregoing reasons, the conviction of Glenn Banks should be affirmed.

Respectfully submitted,

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County of Genesee)
City of Batavia)

U. S. A. vs. Glenn Banks
77-1503

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Buffalo, N.Y. 14202 Att: Edward J. Wagner Esq., Asst. U. S. Attorney

Leslie R. Johnson

Sworn to before me this
8th day of March, 19 78

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1979.

